IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3301 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMKUMAR J AAHIR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3301 of 2001

MR.DEVANG D DAVE for Petitioner No. 1

MR RV DESAI, AGP, for Respondent No. 1-2,4

NOTICE SERVED for Respondent No. 3,5

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 17/09/2002

ORAL JUDGEMENT

Rule. Mr RV Desai, learned AGP waives service of Rule.

2. The petitioner's case in the present petition is that he was appointed as a peon in respondent No.5 Thaker's High School, Ahmedabad in the year 1970. At the time of his appointment in 1970, the petitioner gave his birth date as 7-7-1935 and on that basis the petitioner's service record was prepared. In 1987, when the District Education Officer asked the school principal to furnish the basis of the petitioner's birth date, the Principal's reply was that the birth date was recorded in the petitioner's service book on the basis of the petitioner's horoscope. The District Education Officer, therefore, required the school management to follow the provisions of Rule 171 of the BCSR and in absence of any document, required the petitioner to produce the medical certificate of a civil surgeon for age verification. As per the medical certificate of the civil surgeon, on the basis of the petitioner's physical examination in the year 1987, the petitioner's age was estimated to be 40 years and, therefore, the petitioner's birth date was worked out as 1-7-1937. Hence the petitioner's birth date was changed in the service record to 1-7-1937 instead of 7-7-1935.

3. The petitioner retired on attaining the age of superannuation i.e. 60 years on the basis that he was born on 1-7-1937. When the question cropped up regarding verification of the petitioner's service record for the purpose of computing pensionary benefits, the Directorate of Pension and Provident Fund examined the petitioner's service book and found that the change in the petitioner's service book was made 17 years after joining service and that too, without approval of the Government. The State Government in the Education department also refused to grant any such ex-post facto approval to change in the birth date from 7-7-1935 to 1-7-1937. That communication dated 10-3-2000 (Annexure D) in the present petition is challenged by the petitioner. The petitioner has also challenged the consequential communication dated 14-6-2000 (Annexure E) by which the DEO called upon respondent No.5 school to recover the salary and allowances paid to the petitioner for a period of two years during which the petitioner is said to have unlawfully continued in service on the basis that he was born on 1-7-1937.

4. It is the petitioner's case that since change in the birth date was made upon medical examination which exercise was undertaken on account of the instructions of the DEO, it is not open to the respondent-authorities not to accept the birth date entered in the service record on

the basis of the medical examination which is permissible under Rule 171 of the BCSR. It is further submitted that the petitioner had actually rendered services till he attained the age of 60 years on the basis that he was born on 1-7-1937 and, therefore, it is not open to the respondents to make any recovery of the salary and allowance for the period during which the petitioner had actually rendered the services.

5. On the other hand, Mr RV Desai, learned AGP for the respondent-authorities submits that any request for change in the birth date in the service book cannot be entertained after a period of 5 years as per the provisions of Rule 171 of the BCSR and in the instant case such a change was made in the service book after 17 years. Moreover, the approval of the Government was not obtained and, therefore, even if such change was made in 1987 on account of the age verification by medical examination required by the DEO, the same does not bind the State Government, which is the competent authority for granting approval for such change. It is further stated that since the petitioner was not entitled to continue in service beyond the age of 60 years in view of the petitioner's birth date being 7-7-1935, the salary and allowances received by the petitioner for such excess period must be permitted to be recovered from the petitioner's retiral benefits.

6. Having considered the case of both the parties, it appears to the Court that while there is substance in the submission made on behalf of the respondent-authorities that the change of birth date in the petitioner's service book after a lapse of 17 years from the date of joining service and that too, without approval of the State Government, cannot be relied upon for the purpose of fixing the petitioner's pensionary benefits, that is to say, the respondent-authorities are justified in proceeding on the basis that the petitioner was born on 7-7-1935 as recorded in the petitioner's service book at the time of joining service in 1970, the respondent-authorities are not justified in ordering the recovery of the salary and allowances paid to the petitioner for the two year period in question during which the petitioner had actually rendered services, since the petitioner would be entitled to claim compensation on the basis of the quantum merit.

7. In view of the above discussion, the petition is partly allowed. The direction contained in the impugned order dated 14-6-2000 (Annexure E) from the District Education Officer to respondent No.5-school requiring the

petitioner to recover the salary and allowances paid for the two year period in question is quashed and set aside as illegal. The petitioner's claim for getting retiral benefits on the basis that the petitioner was born on 1-7-1937 cannot be accepted and the respondent-authorities are justified in computing the petitioner;s retiral benefits on the basis that the petitioner's birth date was 7-7-1935.

It is clarified that for the purpose of computing the pension and gratuity payable to the petitioner, the respondent shall take 7-7-1935 as the petitioner's birth date and ignore the two year period during which the petitioner had rendered services on the basis that the petitioner's birth date was 1-7-1937, that is to say, two extra years services rendered by the petitioner wrongly shall be excluded while computing the pension and gratuity payable to the petitioner.

The respondents shall compute and pay the retiral benefits including gratuity payable to the petitioner on the basis of the aforesaid directions as contained in this judgment as expeditiously as possible and in any case within three months from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier.

8. The petition is accordingly partly allowed and partly dismissed. Rule is made absolute to the aforesaid extent only with no order as to costs.

(M.S. Shah,J)

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